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No. 85-908

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR

Petitioners,

v.

FRANK HAYGOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX C AND D

JOHN K. VAN DE KAMP
Attorney General of
the State of California

WILLIAM GEORGE PRAHL
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5262

Attorneys for Petitioners

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harold Cranke, and Benjamin Seymour, respectfully pray that this Court issue a writ of certiorari to review the judgment and en banc opinion of the United States Court of Appeals for the Ninth Circuit in Haygood v. Younger, et al., No. 81-4686 which was filed on August 27, 1985.

OPINIONS BELOW

The en banc decision of the Ninth Circuit Court of Appeals is reported as Haygood v. Younger 769 F.2d 1350 (9th Cir. 1985). A copy of this opinion is attached to the petition filed on November 22, 1985 as Appendix A. The panel opinion of the Ninth Grant Court of Appeals is reported as Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983). A copy of that opinion is attached to the petition as Appendix B. The November 30, 1981 decision of the United States District California denying petitioners' motion for a judgment notwithstanding the verdict is reported as 527 F.Supp. 808 (E.D. Cal. 1981) a copy of that opinion is attached hereto as Appendix C. The unreported decision of the District Court filed on November 30, 1981, granting respondent's motion for attorneys fees is attached hereto as Appendix D.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TO BE PUBLISHED

FRANK HAYGOOD,

Plaintiff, NO. CIVIL S-75-738 LKK

v. OPINION AND ORDER

EVELLE J YOUNGER, etc., et al.,

Defendants.

/

In Haygood v. Younger, 14 Cal.3d 802 (1975), the California Supreme Court determined that Frank Haygood had spent almost five years longer in prison than was permitted under the applicable law. After he was released he brought this suit under 42 U.S.C. § 1983, seeking damages against those he believed responsible for his wrongful incarceration. He predicated his claim upon asserted violations of both the due process clause of the fourteenth amendment and the cruel and unusual punishment provisions

of the eighth amendment, made applicable to the states under the fourteenth amendment.

After trial, the jury found that defendants Cranke and Seymour caused the plaintiff to be deprived of his constitutionally protected rights, and the court entered judgment accordingly.[1/] Those defendants have now moved for judgment notwithstanding the verdict pursuant to F.R.Civ.P. 50(b).[2/]

I

THE FACTUAL BACKGROUND

The facts relating to the plaintiff's various terms of imprisonment, and the miscalculation which led to his unlawful confinement are set forth in the California Supreme Court's opinion in In re Haygood, 14 Cal. 3d 802, 804-808 (1975). It is sufficient for the purposes of this opinion to note that the California Adult Authority erroneously determines that the plaintiff's properly imposed term for escaping from

prison did not begin to run until the plaintiff finished serving a term for a robbery which took place after the escape. The result of this miscalculation was that, in 1974, Frank Haygood found himself serving time in prison for a robbery term from which he had been "administrative[ly] discharged" as of 1969, and for an escape term from which he should have been discharged in 1969. Furthermore, although he was serving time, he was receiving no credit towards the escape term. With the help of another prisoner, Phillip Gaskill, the plaintiff began contacting prison and Department of Corrections authorities, asking how it was possible that he was not being credited for time served on this term.

In March, 1974, the plaintiff received responses to his inquiries from defendant Harold Cranke, a Records Officer at the prison, and defendant Benjamin Seymour, a

Records Officer for the California Department of Corrections. Their responses told the plaintiff, in effect, that his file had been reviewed and that he was lawfully incarcerated under the state's "continuous term policy." With Mr. Gaskill's aid, the plaintiff petitioned the California Supreme Court for a writ of habeas corpus. That Court determined in effect that plaintiff had been held unlawfully, at least since his terms were retroactively fixed in October, 1970. The Court issued the writ of habeas corpus and ordered the plaintiff released forthwith. In re Haygood, 14 Cal. 3d at 812.

The liability of the defendants Cranke and Seymour for plaintiff's excessive incarceration was submitted to the jury at the close of trial. The jury was instructed on both the due process and cruel and unusual punishment theories of liability and returned a general verdict against the defendants.

The defendants moved for judgment notwithstanding the verdict.

The defendants' chief contention in support of said motion is that the evidence at trial was legally insufficient to prove that defendants Cranke and Seymour intended to deprive plaintiff of his constitutional rights, and that any lesser showing fails to meet the state of mind requirement for a damages action based on the eighth and fourteenth amendments. The primary issue therefore, is what state of mind must the defendants have entertained in order to be liable for violating plaintiff's rights under the eighth and fourteenth amendments.

This issue is best analyzed in three parts: First, what state of mind, if any, is required by 42 U.S.C. § 1983 itself? Second, what showing is required when the statutory action is based on the fourteenth amendment's prohibition against deprivation of liberty

without due process? Third, what is the necessary showing for an action based on the eighth amendment's guarantee against cruel and unusual punishments. I will address each of these questions in turn; in doing so I will apply the ascertained rules to the specifics of this case. Finally, I will briefly discuss the defendants' claim that they are entitled to judgment non obstante veredicto based on their good faith defense.[3/]

II

PARRATT V. TAYLOR: MENTAL STATES AND THE REQUIREMENTS OF SECTION 1983

The starting point in my consideration of the defendants' motion is section 1983 itself. I conclude that the statute requires no particular state of mind on the defendants' part in order for liability to be imposed. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Nothing in the language of that statute either explicitly or implicitly requires that an aggrieved plaintiff prove anything regarding a defendant's state of mind. See Parratt v. Taylor, ___U.S.___, 101 S.Ct. 1908, 1912 (1981). The Supreme Court, however, has often discussed damage actions under section 1983 as lawsuits sounding in tort. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 418 (1976); Carey v. Piphus, 435 U.S. 247, 253 (1978); Monroe v. Pape, 365 U.S. 167, 187 (1961). Perhaps because most torts involve some form of culpable mental

state on the part of the tortfeasor (intent, recklessness, negligence, etc.), the lower courts struggled for years to determine what particular state or states of mind were required by this statutory "tort" action. See, e.g., Bonner v. Coughlin, 519 F.2d 1311 (7th Cir. 1975); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 197); Patzio v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); Arnold v. I.B.M. Corp., 637 F.2d 1350 (9th Cir. 1981). The result was an impossible tangle of diverse legal doctrines. See Parratt v. Taylor, ___ U.S.___, 101 S.Ct. 1908, 1911-12 (1981).

Over the course of two decades the Supreme Court loosed this knot, strand by strand. In Monroe v. Pape, 325 U.S. 167 (1961), the Court held that the civil cause of action provided by section 1983 -- unlike its criminal law counterpart (18 U.S.C. § 242) -- did not require a showing that the

defendant acted with the specific intent to deprive the plaintiff of constitutionally protected rights. In Baker v. McCollan, 443 U.S. 137, 139-40 (1979), the Court suggested that simple negligence could provide a basis for liability under section 1983. The following year, the Court emphasized that "[b]y the plain terms of section 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640 (1980). Finally, last term, the Supreme Court severed the remaining threads: in unambiguous terms it announced that there is no state of mind requirement for an action brought under 42 U.S.C. § 1983. Parratt v.

Taylor, ___U.S.___, 101 S.Ct. 1908, 1912-13 (1981).

In Parratt, an inmate of a Nebraska prison (Taylor) ordered a hobby kit by mail. Contrary to the prison's regular procedure the prisoner was not notified when the package containing the hobby materials arrived; when he inquired about his materials he was told tnat the package had been lost. The prisoner filed an action under section 1983, alleging that his fourteenth amendment rights had been violated.[4/] The district court held that by negligently failing to follow their own policies the prison officials had deprived the prisoner of his property without affording him due process of law. The district court granted the prisoner summary judgment and the Eighth Circuit affirmed, per curiam. 620 F.2d 307 (8th Cir. 1980). The Supreme Court granted certiorari in the case for the express purpose of

deciding "whether mere negligence will support a claim for relief under § 1983."U.S., 101 S.Ct. at 1911, 1912.

After setting forth the facts and posture of the case, the Court reviewed its own decisions in the area. It concluded that "[section 1983 ... has never been found by this Court to contain a state of mind requirement... Both Baker v. McCollan and Monroe v. Pape suggest that section 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any section 1983 action the initial inquiry must focus on whether the two essential elements to a 1983 action are present: (1) whether the conduct complained of was committed under color of state law; and (2) whether this deprived a person of rights, privileges or immunities

secured by the Constitution or laws of the United States." U.S., 101 S.Ct. at 1912-13. (Emphasis added).

It follows, of course, that the jury's verdict in the instant case is not susceptible to challenge on the ground that the plaintiff did not prove intent and thus failed to satisfy the state of mind requirement of section 1983. Once again, the Supreme Court has held that there simply is no such requirement. Having resolved this threshold question, I now examine whether the plaintiff presented sufficient evidence at trial to satisfy the two elements that are required by section 1983.

Without doubt, defendants Cranke and Seymour, while performing their tasks as state officials, were "acting under color of state law." Monroe v. Pape, 365 U.S. 167, 172-87 (1961); Parratt v. Taylor, ___U.S. ___, 101 S.Ct. 1913. "The defendants'

conduct was engaged in under color of state law if they were clothed with the authority of the State and were purporting to act thereunder []." Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962). The defendants in the instant case were both state employees. Both were charged with the responsibility of examining prisoners' records for the purpose, inter alia, of determining whether and when the prisoners were entitled to be released. Thus the first element of the action is satisfied.

The second element requires plaintiff to have established that the defendants deprived him, or caused him to be deprived, of some right protected by federal law. 42 U.S.C. § 1983; Gomez v. Toledo, 446 U.S. 635, 640 (1980); Parratt v. Taylor, supra. In the instant case plaintiff asserted that he was deprived of rights protected by the fourteenth amendment. He tendered to the jury

two different theories as to how he has been so deprived.

First, he claimed that insofar as he was confined in prison after his terms had run, he was deprived of his liberty without due process. Thus, in the Supreme Court's words, plaintiff alleges a violation of "the Due Process Clause of the Fourteenth Amendment simpliciter." Parratt v. Taylor, ___U.S. 101 S.Ct. at 1913. Second, he claimed that this unlawful incarceration amounted to cruel and unusual punishment and thus violated the rights guaranteed him by the eighth amendment. The application of eight amendment protections against the states is another constituent of due process under the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). It could be said, therefore, that plaintiff is following alternative routes from the same events to, perhaps, the same result. Because each constitutional

protection has its own standards, and thus the requisites for violation of each may vary, it is necessary to examine each in turn. In doing so, I will address the defendants' contention that there is some further state of mind requirement required for violation of either of the underlying constitutional claims.

III

THE DUE PROCESS SIMPLICITER THEORY

The more direct of plaintiff's section 1983 claims is that the defendants caused him to be denied his liberty without due process of law. Again, the Supreme Court has instructed the lower courts as to the specific prerequisites that the plaintiff must satisfy in order to prevail on his claim that he was divested of a protected interest without due process of law. After showing that the defendants were acting under color of state law, he must prove:

a. That the interest deprived was constitutionally protected (i.e., life, liberty, or property);

b. That the deprivation was without due process of law; and

c. That the charged defendants subjected him, or caused him to be subjected, to the deprivation. (See Parratt v. Taylor, ___U.S.___, 101 S.Ct. at 1913).

A. The Protected Interest

The first of these factors presents no obstacle to this plaintiff. It is manifest that Mr. Haygood was deprived of a protected interest: he lost no less than his liberty. After life itself, no right is more jealously guarded by our Constitution, legal system, and our cultural mores. Yet, as Justice Rehnquist stresses, "[t]he Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty 'without due process

of law.'" Baker v. McCollan, 443 U.S. at 145; Parratt v. Taylor, ___U.S.___, 101 S.Ct. at 1913. Indeed, for a number of years Frank Haygood was serving a sentence duly imposed by a court of law; there is no assertion that he was initially incarcerated without due process See, Meachum v. Fano, 427 U.S. 215, 224 (1976). After his term of lawful incarceration came to an end, however, the plaintiff remained in prison. It is that period of unlawful detention which gives rise to the present lawsuit, and it is upon that period the analysis must focus.

B. The Process Due

"Once it is determined that due process applies, the question remains what process is due." Morrisey v. Brewer, 408 U.S. 471, 481 (1972). At a minimum, the process due this plaintiff was to be sentenced and incarcerated only in the manner and to the extent prescribed by California law. There can be

no dispute, however, that the plaintiff was imprisoned for more than 4-1/2 years after his term, as fixed by state law, came to an end. It follows inevitably that "when his sentence expired, the State lost its power hold him, and ... his continued detention violate[d] his rights under the Fourteenth Amendment." McNeil v. Patuxent Institution Director, 407 U.S. 245, 246 (1972). In short, the plaintiff did not receive the pr cess due him.

The defendants argue that Parratt v. Taylor and Baker v. McCollan compel the opp site conclusion. As I shall now demonstrat the defendants confuse the result in a give case with it teaching. Thus, the Supreme Court applied essentially the same mode of analysis in Parratt that I have traced above. In that case, however, the Court concluded that Taylor had received the pro- cess due him on the facts of his case; thus

his claim was denied. On this basis, the instant defendants seek to argue that Haygood's claim must also be rejected. It seems elementary, however, that this court is not bound to deny all future section 1983 claims based on due process simpliciter simply because Mr. Taylor (or the plaintiff in Baker v. McCollan) failed to make out his cause of action. It is not the disposition of those cases which controls this lawsuit; rather it is the rules of law announced and how those rules were applied to the facts.

In Parratt, the Supreme Court -- after disposing of the question of mental states and section 1983 -- applied the factors outlined above to parse the plaintiff's due process claim. The Court determined that the defendants had acted under color of state law, that the plaintiff's hobby kit was "property" in the fourteenth amendment sense, and that plaintiff had been "deprived of

it.[5/] The Court then asked whether the plaintiff received the process due him. The process due Mr. Taylor, the Court held, was the opportunity to be heard "at a meaningful time and in a meaningful manner" at some time before Nebraska finally deprived him of his property. 101 S.Ct. at 1915 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). This did not mean, though, that the hearing had to take place before the hobby kit was lost; given that the property was lost inadvertently such a hearing obviously could not have been held. According to the Court, then, a hearing before property is seized (or lost) is not always required if the claimant has a "meaningful opportunity" afterward to regain his or her property, or its equivalent. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). In Mr. Taylor's case, the Court noted, Nebraska had a torts claims statute under which the plaintiff could have

sued for his hobby kit or its value. 101 S.Ct. 1917. Thus, the Court concluded, the plaintiff in Parratt had been afforded all the process that was due him (indeed that was possible to accord him) before being finally deprived of his property. Id.

The defendants point out that in Parratt, the Supreme Court found that the hearing held after the claimant was deprived of certain property interests was sufficient to satisfy due process They argue that a post-deprivation hearing should also be sufficient to satisfy due process when what is at stake is a deprivation of liberty. Thus, the defendants contend, because California has a tort claims statute under which the plaintiff could have sued,[6/] he was foreclosed from bringing this section 1983 action in the federal courts.

This argument, although it is seductive initially, fails to make the crucial

distinction between the right guaranteed to plaintiff by the Due Process Clause, and the remedy which is available to him if that right is breached. The issue that is tendered here is whether the plaintiff's rights were violated, not whether he has a remedy at law for the injury caused him by that violation. That is not to say that the efficacy of a post-deprivation hearing to remedy the injury is not pertinent -- that is a factor in considering whether due process has been accorded it is, however, not the relevant factor in this case.

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin wit@ a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961);

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Applying this rule to the instant case, it is clear that the plaintiff was due a hearing before he was imprisoned for a term of years; clearly the plaintiff received such a hearing before he was committed to Folsom in the first instance. But that is the beginning, not the end of the inquiry. It follows from the fact that the plaintiff received a hearing and was lawfully confined that he had a correlative due process right to be released from prison when his lawfully fixed term of imprisonment expired. McNeil v. Patuxent Institution Director, 407 U.S. 245 (1972); Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969); Speaks v. McGregor, 355 F.Supp. 1129 (W.D. Va. 1973).

Thus a properly focused analysis reveals that the process to which Mr. Haygood was entitled was to have his liberty restored him at the precise moment fixed by state law. In

Parratt, by contrast, the Court held that plaintiff's interest was solely to receive his property, and thus a post-deprivation hearing would suffice, since that process would restore the property itself or its functional equivalent -- its value in money. It should go without saying that money is not the equivalent of months of one's life spent in prison.

Even if due process could have been satisfied by providing Frank Haygood a hearing, a hearing held after he was released would not suffice. As Parratt teaches, the Constitution requires a hearing before the claimant is finally deprived of his interest. 101 S.Ct. at 1908. On these facts, a post-deprivation hearing simply does not and cannot meet that requirement, since once liberty is gone it can never be recovered. Money is compensation for liberty denied; money is not liberty itself. It seems clear,

therefore, that the tort action supplied by the state simply will not satisfy due process when what was required was the timely release of the plaintiff.

Moreover, holding that a tort remedy is all the process due for a deprivation of liberty under the facts of this case would be unsatisfactory for another reason.

Defendants' argument suggests that government officials are permitted under the Due Process Clause to incarcerate individuals for any reason they wish or no reason at all as long as the state later pays those individuals for their lost time. To state the result of the argument is to answer it. Yet this reductio ad absurdum is useful to illustrate that what is at issue here is the nature of the constitutional right guaranteed. The effect of these guarantees is presumably to set a standard of conduct for government officials.

One hopes and expects that most government officials will conform their conduct to these constitutional standards; but for this to happen, it must be clear what is required, not just what the remedy is for the occasional breach.

Finally, the notion that underlies the defendants' argument is simply inconsistent with applicable precedent. In effect, what the defendants propose is no more than a disguised requirement that a plaintiff must exhaust state remedies before bringing a section 1983 action based on due process simpliciter. That proposal ignores two decades of case law as well as the history of the statute itself. In Monroe v. Pape, 365 U.S. 167 (1961), after a lengthy discussion of the statutory history, the Supreme Court concluded that section 1983 was not intended merely as a remedy that would stand behind those provided by the states, to come into

play only when the state remedies fail to function. Rather, the Court said:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and reissued before the federal one is invoked.

365 U.S. 183. See also Comment, Actionability of Negligence Under § 1983 and the Eighth Amendment. 127 U.Penn. L.R. 533, 554-555 (1978).

In sum, the existence of a state tort cause of action does not establish that Frank Haygood was afforded due process when he was deprived of his liberty, nor does it bar his lawsuit under section 1983. Accordingly, the question was properly submitted to the jury. Nonetheless, defendants argue the jury's verdict cannot be allowed to stand since, they assert, even if there is no mental requisite under the statute, the constitutional provision implicates such a

requirement. This argument, as I explained below, must also fail.

C. Subjects or Causes to be Subjected

Defendants contend that they cannot be held liable unless plaintiff has shown that they intentionally acted to deprive him his liberty.[7/] Alternatively, defendants argue that regardless what standard is applied there was not sufficient evidence for the jury to have found them liable. Neither of these contentions has merit. Once the plaintiff demonstrated that he was deprived of liberty without due process, the only thing he needed to prove regarding these defendants was that they subjected him or caused him to be subjected to the deprivation. The plaintiff introduced evidence sufficient to meet this standard.

I have already noted that section 1983 itself contains no suggestion of a state of mind requirement. Neither can I discern

anything in the language of the fourteenth amendment's Due Process Clause that in any sense implies that a person is not "deprived" of his or her rights unless another intentionally (or negligently for that matter) caused the deprivation. Simply put, the idea that a state of mind requirement is implicit in the Due Process Clause accords with neither its plain words, nor its purpose. The purpose of the great provisions of the fourteenth amendment is to protect the rights of the individual -- not to impose punishments on individuals who are "guilty" of violating those rights. Clearly, the fact that the statute imposes liability for violations of the Constitution, does not change the character of the constitutional provision itself. Since, as I have shown, the statute prohibits any violation of the Constitution under color of state law, the notion of "moral guilt or blame" that underlies the

requirement of intent in tort is wholly irrelevant. See Prosser, Law of Torts, 16 (4th ed. 1971).

Nor did the Supreme Court. in Parratt, imply an intent requirement into the underlying constitutional claim. In fact, the majority opinion specifically noted that the deprivation to the plaintiff in that case was no less a deprivation for having been negligently caused.[8/] Justice Powell, it is true, suggests in his concurring opinion that a state of mind requirement may exist he argues that: "A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." 101 S.Ct. at 1919 (Footnote omitted). Nonetheless, neither the majority, nor any of the four other justices who chose to write separate opinions, joined him in this view.

What remains, therefore, is for the court to determine whether the jury could reasonably conclude that defendants Cranke and Seymour subjected the plaintiff or cause him to be subjected to the ascertained deprivation of his federally protected rights. See Yeaman v. United States, 584 F.2d 322, 326 (9th Cir.1978). The evidence showed that both defendants were charged with the responsibility of determining when inmates were to be released. Both received letters from the plaintiff protesting the computation of his sentence. Each defendant made a brief inquiry into the plaintiff's situation, determined that he was serving consecutive terms, and that the Adult Authority had fixed his release date at some time in the future.

Defendant Cranke sent the plaintiff a two line response on a slip of paper informing him that "all terms are tied together. He attached a California Attorney General's

opinion stating that "[c]onsecutive sente
are considered as one continuous term and
'neither shall expire until each are
completed.'" Defendant Seymour sent the
plaintiff a brief letter containing the s
information, to which he attached the sam
opinion.[9/]

Clearly it was not what the defendant
did that makes them liable to the plainti
it was what they failed to do. As the Ni
Circuit has taught:

> A person 'subjects' another to t
> deprivation of a constitutional right
> within the meaning of section 1983, i
> he does an affirmative act, participa
> in another's affirmative acts, or omi
> to perform an act which he is legally
> required to do that causes the depriv
> tion of which complaint is made."

Johnson v. Duffy, 588 F.2d 740, 743 (9th
1978) (Emphasis added); see also Sims v.
Adams, 537 F.2d 829 (5th Cir. 1976). Whe
what is involved are acts of commission o
omission, the question is: was the defen
dants' conduct a legal cause of plaintiff

deprivation? Arnold v. International Business Machines, 637 F.2d 1350 (9th Cir. 1981). There was ample evidence showing that both defendant Cranke and defendant Seymour were legally required to correctly compute the plaintiff's sentence and to set in motion the process that would lead to his timely release.[19/]

The jury reasonably could have found that these men were charged with ensuring that the plaintiff was either serving the sentence lawfully meted out to him or was released from confinement. The defendants protest, though, that it was not their actions or omissions which caused the plaintiff's unlawful imprisonment; rather, it was a miscalculation made years before by the Adult Authority. It is true that these defendants cannot be liable for the initial period of unauthorized incarceration. In March, 1974, however, the plaintiff's letters put them on

notice that something was wrong with his sentence; the period for which the defendants are liable spans from that time until his release, approximately seventeen months later. They are being held to answer not for the mistakes of others, but for their own failure to look past those mistakes, make the necessary calculations, and see to it that the defendant was freed. Johnson v. Duffy, supra.

In this regard, the defendants point out that the letters they received failed to raise the specific grounds on which the California Supreme Court eventually ordered the plaintiff released. Thus, they argue, they were never put on sufficient notice to invoke their duty independently to recompute the plaintiff's sentence.The answer, of course, is that the assertion is one of fact for the jury. Neither the plaintiff nor the other prisoner aiding him were attorneys;

these prisoners had at best limited access to the appropriate material regarding sentencing standards.The jury could reasonably believe that the plaintiff could not be expected to do more than to inform the appropriate authorities that there was something wrong with his sentence.It was the defendants who had the expertise, the full access to records, standards and statutes, and who were charged with the responsibility of enforcing the law. Certainly the jury could have found that these defendants had sufficient notice but nevertheless failed to execute their duties.

Finally, the defendants argue that they are only charged with failure to investigate, and that under Baker v. McCollan, 443 U.S. 137 (1979) they cannot be held liable on that basis. Once again, the defendants confuse the outcome of the case with the rules of law announced in it. An examination of the facts

and principles in Baker requires me to reject the defendants' argument. In Baker, one Leonard McCollan was arrested on narcotics charges and presented a drivers license as identification. The license had been issued to his brother, Linnie Carl, but bore Leonard's picture. Leonard was booked, signed a number of documents, and was released on bail using his brother's name. When Leonard subsequently failed to appear the bondsman sought and obtained a warrant for Linnie Carl's arrest. Linnie Carl was taken into custody on the warrant and was held -- despite his protests of mistaken identity -- for several days. After the officials finally released him, Linnie Carl brought a section 1983 action against the sheriff who operated the jail. The district court directed a verdict for the defendant; however, the Court of Appeals for the Fifth Circuit reversed, stating that Linnie Carl

McCollan had made out a claim for a "[§] 1983 false imprisonment action. 443 U.S. at 141-142.

The Supreme Court reversed the Court of Appeals, holding that although the plaintiff may have stated a tort claim for false imprisonment, he did not state a cause of action under section 1983 for denial of liberty without due process. The analysis was basically the same one the Court later employed in Parratt: the plaintiff had been deprived and the deprivation was of a protected interest; the question, again, was whether his liberty was denied without due process. The Court concluded that Linnie Carl had received all the process due him. He had been arrested pursuant to a valid warrant and upon probable cause. He was not denied his right to a speedy trial at which time (if no sooner) he could establish his innocence. Thus, unlike Frank Haygood, Linnie Carl

McCollan was being held lawfully, under the authority of state law. 443 U.S. at 143-146.

The defendants in the present case attempt to make much of language in Baker that the Constitution did not impose a duty on the sheriff, when executing a valid arrest warrant, "to investigate independently every claim of innocence...." Id. at 146. However true that statement may be, it does not follow that a public official never has a duty to investigate, nor that in this case defendants Cranke and Seymour did not have a duty to investigate Frank Haygood's claims of unlawful detention. Indeed, according to their job descriptions that was precisely their duty. Moreover, the Court prefaced its statement in Baker by pointing out that "[a] reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers -- all of whom may be potential defendants in a § 1983 action -- is

entirely consistent with 'due process of law.'" Id. at 145. In other words, the sheriff's duty was only to arrest and detain the plaintiff in a lawful manner. Once the sheriff had "probable cause" he had discharged his duty. It was not the sheriff's job to determine whether the plaintiff was in fact innocent of the charges on which he was held, or to decide whether he should have been released: that responsibility fell to the magistrates and judicial officers. By contrast, in the instant case the jury could have found that it was the duty of Cranke and of Seymour to ascertain Frank Haygood's term of imprisonment and to see to it that he was released at the end of his term. The jury reasonably could have found that defendants' duty was not performed.

To sum up, the plaintiff adduced sufficient evidence from which the jury could

conclude that: (a) the plaintiff was deprived of his liberty; (b) the deprivation occurred without due process of law; and (c) that these defendants subjected plaintiff to the deprivation, or caused him to be subjected to it. Thus plaintiff did all that was required to prove a section 1983 claim based on due process simpliciter. As I have explained, neither section 1983 nor the Due Process Clause of the fourteenth amendment requires plaintiff to make any specific showing regarding the defendants' states of mind.

The requirements for plaintiff's cause of action properly focus only on the questions of constitutional harm and causation. In this sense the statute imposes liability regardless of fault. Nonetheless, judicial gloss has provided the defendants with relief from the rigors of the statute. The courts have recognize that officials are not

susceptible to liability under section 1983 if they can show that they acted reasonably and in good faith. The defendants' contentions in this regard will be addressed in Part V of this opinion. First, however, I will discuss the sufficiency of the plaintiff's claim to the extent that it relies on the eighth amendment.

IV

THE EIGHTH AMENDMENT THEORY

As a second theory of liability, the plaintiff argued that his incarceration in the maximum security prison at Folsom after his term had ended constituted cruel and unusual punishment. Thus, plaintiff maintained, to the extent that the defendants were responsible for his continued unlawful imprisonment, they caused him to be deprived of his rights under the eighth amendment.[11]/

At trial this court instructed the jury that:

> In order to find plaintiff has been subjected to cruel and unusual punishment you must find that defendants, or any of them, by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment.

The defendants contend that there was not sufficient evidence for the jury to find that they violated Frank Haygood's eighth amendment rights, and that they are thus entitled to judgment notwithstanding the verdict as to this theory of liability.[12/] I conclude that there was sufficient evidence to support a finding by the jury that defendants Cranke and Seymour intended to punish the plaintiff. In the usual case, that would end the court's discussion of this portion of the defendants' motion.

This is a somewhat unusual case, however, for it involves a number of issues that lie at the heart of section 1983 litigation. One of those issues is whether a plaintiff who complains of cruel and unusual punishment

must demonstrate that the parties sued in any sense "intended" to deprive him of his eighth amendment rights. The instant motion allows the court the opportunity to consider this issue free from the pressures of trial, which include the need to make immediate decisions on legal issues. This more deliberate consideration leads me to believe that, even if eighth amendment violations are by definition intentional acts, it need not be proved that the defendants themselves bore that intent. All that the plaintiff must show is that the defendants caused the deprivation to occur.[13/] Before discussing in detail the question of intent under the eighth amendment, however, I will address the particular objection raised by the defendants.

A. The Sufficiency of the Evidence Proving Intent

The defendants' argument here seems to proceed from the premise that they could be held liable only if they specifically

intended to confine the plaintiff. They protest that they had neither the desire nor the power to so harm the plaintiff. The argument misconstrues the meaning of "intent" as that concept applies to the case at bar.

On at least one point the law is quite clear: the plaintiff was not required to show that defendants had the specific intent to deprive the plaintiff of his constitutional rights. Monroe v. Pape, 365 U.S. at 187. Rather, the defendants are held to have intended the consequences substantially certain to follow from their acts and omissions. Procunier v. Navarette, 434 U.S. 555, 566 (1978) (citing Restatement, Second, of Torts, § 8A); see also Prosser, supra, pp. 31-32. The evidence shows that defendants Cranke and Seymour, despite their duty (and power) to inform the appropriate authorities that the plaintiff was entitled to be released, failed to do so. The result, which the defendants

knew was substantially certain to occur, was that the plaintiff remained in prison. The jury could reasonably have found that the defend intended to confine the plaintiff, and that they thus subjected him to cruel and unusual punishment.[14/] As I suggested, however, it is unclear that the plaintiff in the present case was even required to make such a showing of general intent.

B. Intent and the Eighth Amendment

The proper role played by intent in a claimed eighth amendment violation has recently received attention from the courts. Thus, in a setting different from the instant case the Supreme Court has suggested that, in the context of the constitutional amendment, the word "punishment" signifies harm inflicted purposefully -- generally as part of the criminal sanction. Bell v. Wolfish, 441 U.S. 520, 536-540 (1979). Nonetheless, the Ninth Circuit subsequently held that

intent to punish is not a necessary compon
of an eighth amendment claim under section
1983. Spain v. Procunier, 600 F.2d 189, 1
(9th Cir. 1979). This seeming inconsisten
is readily resolved by examining the cases
the context of the statute and the underly
constitutional claim. Read together, the
cases teach that, at most, what is require
in a section 1983 action based on the eigh
amendment is that the defendants intended
punish the plaintiff or that they caused
another person intentionally to inflict ha
on the plaintiff, and that the harm inflic
was cruel and unusual.

The instant case is an excellent illustration of this point. First, there be no doubt that the unlawful detention of Frank Haygood at Folsom Prison was "punish ment" in the constitutional sense. Hutto Finney, 437 U.S. 678, 685 (1978). Obvious someone was keeping the plaintiff in prisc

purposefully in order to impose what they (wrongly) perceived to be an appropriate criminal sanction. The defendants do not dispute that, to the extent that the plaintiff's incarceration was unwarranted, it was also "cruel and unusual." (See my discussion, infra). The necessary conclusion, then, is that the plaintiff was subjected to a deprivation of his rights under the eighth amendment.

Second, assuming the jury predicated its award on eighth amendment grounds, the question of causation was resolved by the jury against these defendants. It was not necessary for the plaintiff to show that these defendants were the persons who subjected him to the deprivation; i.e., that they were the ones who purposefully inflicted harm upon him. "The requisite causal connection can be established not only by some kind of personal participation in the deprivation,

but also by setting into motion a series of acts by others which the actor knows or should know would cause others to inflict the constitutional injury." Johnson v. Duffy, 588 F.2d at 743-744. I have already discussed the evidence showing that defendants Cranke and Seymour had a duty to determine the plaintiff's release date, and that by failing to execute that duty the defendants caused the plaintiff's continued and illegitimate incarceration. Hence the jury could have found that the defendants, by failing to execute their responsibilities, caused the plaintiff to be subjected to a deprivation of his eighth amendment rights. That is all that is required of plaintiff under this theory of section 1983 liability.[15/] Thus, the analysis of the eighth amendment claim like the fourteenth amendment claim, supra), turns wholly on the questions of deprivation and causation. Nonetheless,

the defendants maintained and this court accepted that the eighth amendment itself implicates some mental state into the plaintiff's cause of action. My acquiescence in the defendants' request to give the intent instruction rested in part on a hurried reading of Estelle v. Gamble, 429 U.S. 97 (1976). A closer examination, however, convinces me that the Supreme Court's holding in Estelle did not require the plaintiff in the instant lawsuit to make any showing as to the defendants' states of mind.

C. Estelle v. Gamble: The Significance of the Phrase "Cruel and Unusual."

In Estelle, an inmate of the Texas Department of Corrections brought a section 1983 action against, inter alios, the Medical Director of the prison in which he was confined. The essence of his complaint against the doctor was that due to the negligence of the doctor and his staff, the prisoner had

been given inadequate medical treatment. This alleged professional negligence, the prisoner claimed, constituted cruel and unusual punishment.

The Court traced the evolution of "cruel and unusual punishment" as a constitutional standard, and discussed how that standard had been applied to the medical treatment of prisoners. Even given a liberal reading of the term "cruel and unusual," the Court concluded,

> [m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.

429 U.S. at 106.

I have already noted that in this case, unlike Estelle, the was evidence that the defendants intended to deprive the plaintiff of his eighth amendment rights. Moreover, in

Estelle, unlike the instant case, there was no suggestion that the defendant doctor caused anyone else to punish the prisoner. Although Estelle is thus easily distinguishable from the case at bar, the fact remains that the Supreme Court's opinion has been given a broad reading in regard to the state of mind requirement, and thus merits an examination on its own terms.

Estelle, like the present case, involved an eighth amendment claim by a prisoner who alleged that he was injured as a result of an official's breach of duty. The resemblance between the cases is entirely superficial, however, for Estelle addressed a very different set of issues than those raised in the present case. The heart of the question in Estelle was whether the alleged negligent medical treatment suffered by the prisoner in itself transformed lawful punishment into "cruel and unusual" punishment. The Court

held it did not. Medical malpractice, unfortunately, is a risk run by every patient whether the patient is in prison or in a penthouse. The fact that a prisoner must run the same risks as the population at large is not, in the Supreme Court's words, "repugnant to the conscience of mankind." 429 U.S. 106; quoting Lousisiana ex rel Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring). Estelle held, in short, that medical malpractice does not per se make otherwise legitimate punishment "cruel and unusual." Nonetheless, the Court noted that a prisoner, unlike persons who are free, "must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." 439 U.S. 103. It is this necessary reliance which in an appropriate case can transmute deliberate indifference (which in the case of free person would be no more than tortious

conduct) into cruel a unusual punishment. Because the state must provide medical care sufficiently adequate to conform to "the evolving standards of decency that mark the progress of a maturing society" (429 U.S. 102, quoting Trop v. Dulles, 356 U.S. 101 (1958)), a conscious failure to do so constitutes cruel and unusual punishment. For the same reason "deliberate indifference" must likewise be so condemned. Negligence on the other hand is a risk of treatment all persons suffer in common.[16/] Only deliberate indifference to the prisoners' medical needs would put them at a greater risk than they suffer outside and thus only such reckless medical treatment could make otherwise legitimate penal servitude "cruel and unusual."

Some commentators have suggested that Estelle v. Gamble is significant only in cases of medical maltreatment of prisoners. See, e.g., Comment, Actionability of

Negligence Under § 1983 and the Eighth Amendment, 127 U.Penn Law Review 533, 565-575. Regardless of whether the Estelle holding can be extrapolated to situations outside of the medical malpractice context, it clearly does not apply to the case at bar. The harm done to the plaintiff did not result from a risk of everyday life. As I have explained, Frank Haygood's unlawful confinement was punishment, and there was sufficient evidence for the jury to find the defendants in part responsible for its unlawful continuation. The central issue in Estelle was whether permissible punishment became "cruel and unusual"by virtue of the doctor's failure to act. That is hardly an issue in this case: there can be little doubt that the punishment endured by this plaintiff, after he should have been released was "cruel and unusual." In this context, it is not relevant whether lawful confinement at

Folsom Prison is by nature "cruel and unusual." As the Court said in Robinson v. California: "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 660, 667 (1962). Once Frank Haygood served the sentence imposed by law, he had as much right to be free as any other person; he was no longer being punished for any crime whatsoever. The jury could have concluded that the long months of unsanctioned confinement suffered by this plaintiff constituted "cruel and unusual punishment," regardless of what the defendants intended. Once again, there was sufficient evidence of the defendants' intent. Moreover, to the extent that the defendant caused such an injury to the

plaintiff, they were liable to him under section 1983.

V

THE AFFIRMATIVE DEFENSE OF GOOD FAITH AND REASONABLENESS

In the foregoing analysis I have emphasized that neither section 1983 nor the underlying constitutional claims requires any showing by the plaintiff regarding these defendants' states of mind. By its terms, then, the statute makes those defendants subject to liability regardless of fault for any actions or omissions so long as they have caused injury to the plaintiff's protected interests. The courts, however, have held that it would be neither fair nor sound social policy to subject public officials to strict liability under section 1983. Accordingly, the Supreme Court has announced a qualified immunity from liability damages in section 1983 actions. Wood v. Strickland,

420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). This qualified immmunity was extended to prison officials in Procunier v. Navarette, 434 434 U.S. 555 (1978).

The immunity is properly characterized as an affirmative defense (Gomez v. Toledo, 446 U.S. 635, 640 (1980)); accordingly, as the defendants concede, they bore the burden of proof on this issue.[17/] While a judgment notwithstanding the verdict may be granted for a party bearing the burden of proof, the standard is somewhat recast: The court must conclude "that as a matter of law the evidence was capable of only one interpretation." Juhnke v. EIG Corp., 444 F.2d 1323, 1325 (9th Cir. 1971). Thus such a motion should be granted "[o]nly in an exceptional case." Id.; see also Wright & Miller, Federal Practice and Procedure: Civil § 2535 (1971).

Granting the defendants' motion in the instant case would signify that the only conclusions that could be drawn from the evidence are: (1) that the defendants acted entirely in good faith, and (2) that the defendants reasonably believed that the action they took was appropriate. Procunier v. Navarette, supra, 434 U.S. at 562; Scheuer v. Rhodes, supra, 416 U.S. at 247-48. The defendants argue that they harbored no ill-will towards the plaintiff, and that the "good-faith" prong of the test is made. Assuming arguendo that the evidence on ill-will is conclusive, I cannot agree, however, that as a matter of law the defendants acted reasonably when they responded to the plaintiff's inquiries. There is evidence that the defendants made only a cursory check the plaintiff's records; their written responses to him were terse and oblique. They undertook no further investigation, nor did they

seek to institute a hearing or other administrative procedure to determine if the plaintiff should have been released. The jury, after evaluating this evidence, could reasonably have decided that the defendants' conduct was not reasonable under the circumstances.

The defendants refer to the testimony of one of their colleagues who said, in effect, that no records officer would have done more than the defendants did. Such evidence, even if believed, raises at best an inference that what the defendants had done was reasonable; the jury was free to come to the opposite conclusion. In the words of Mr. Justice Holmes: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470 (1903).

Similarly, the defendants make much
the fact that it was not until a year an
half after they wrote to Mr. Haygood tha
California Supreme Court decided that th
plaintiff was being held unlawfully.
Certainly, if the defendants' responses
come after the issue had been adjudicate
they would have been foreclosed by law f
asserting this defense. Wood v. Strickl
supra, 420 U.S. at 322; Johnson v. Duffy
supra, 588 F.2d at 745. The fact that t
defendants are not negligent as a matter
law though, does not mean that they acte
reasonably. This is not a case where th
defendants were "charged with predicting
future course of constitutional law."
Pierson v. Ray, 386 U.S. 547, 557 (1967);
also Benson v. Hightower, 633 F.2d 869 (9
Cir. 1980). Rather, the plaintiff prese
credible evidence that the defendants, a
being put on notice, simply refused to

investigate a computational error. In like fashion defendants' reliance on the Attorney General's opinion is of no avail. As defendants themselves repeatedly argued during the course of the trial, it was not the application of the "continuous term" policy to plaintiff's case which caused the harm, but the failure to perceive which of two terms preceded the other. The Attorney General's opinion dealt only with the continuous term policy and thus was wholly irrelevant to plaintiff's plight.

The question of the reasonableness of the defendants' conduct was a matter for the jury to decide. There was ample evidence for the jury to conclude that the defendants did not act in a reasonable and prudent manner given the totality of the circumstances. Among those circumstances was the fact that another person's freedom hung in the balance.

VI

CONCLUSION

The plaintiff presented sufficient evidence for the jury to conclude that defendants Cranke and Seymour caused the plaintiff to be subjected to a deprivation of the rights guaranteed him by the fourteenth amendment to the Constitution. Frank Haygood's confinement at Folsom Prison, after he had completed the sentence imposed upon him, constituted a deprivation of liberty without due process of law, and could be viewed as cruel and unusual punishment. The defendants acted under color of state law, and the jury could reasonably have concluded that the acts or omissions of the two officials caused the deprivation of the plaintiff's rights during the last seventeen months of his confinement. Thus the plaintiff fulfilled all the requirements for a section 1983 action brought to vindicate his

rights under the eighth amendment and the Due Process Clause of the fourteenth amendment. The plaintiff's evidence was not insufficient for failure to prove the defendants' intent, for no such state of mind showing is required.

The defendants did have an opportunity to demonstrate that they acted reasonably and in good faith, and thus argue that they were not liable. The evidence presented, however, did not preclude the jury from finding that the defendants acted unreasonably and were not immune from damages.

For the reasons stated, the defendants' motion for judgment notwithstanding the verdict is denied.

IT IS SO ORDERED.

DATED: November 30, 1981.

LAWRENCE K. KARLTON
U.S. District Judge

FOOTNOTES

1/ The plaintiff sought recovery against the state Attorney General, the nine members of the California Adult Authority, the Director of the state Department of Corrections, the warden of Folsom State Prison, the Administrative Officer for the Adult Authority, a correctional counselor at the prison, and defendants Cranke and Seymour. Pursuant to various pretrial motions, the claims against the Attorney General, the Adult Authority members and the Director were dismissed before trial by the Hon. Thomas J. MacBride. During the pendenc of this litigation, Judge MacBride assumed Senior status and the case came to the autho or this opinion to be tried. At the close o plaintiff's case, this court directed that verdicts be rendered in favor of the Warden, the Correctional Counselor, and the Administrative Officer, but denied the motio for directed verdict as to defendants Cranke and Seymour.

2/ The parties have brought on several post-trial motions. This opinion deals only with the defendants' motion for judgment not withstanding the verdict. The balance of th matters present by the parties, as well as the procedural issues, are resolved in an accompanying unpublished memorandum order. My reasons for so limiting the instant published order are explained in this court opinion in Kouba v. Allstate Insurance Co., ___F.Supp.___, Civil S-77-99, Slip Op. at 2, n.2 (E.D. Cal. September 3, 1981).

3/ Plaintiff's erroneous contention that defendants' motion is not timely is disposed of in the unpublished companion opinion. See n.2, supra.

4/ The fourteenth amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5/ The Court carefully noted that "the alleged loss, even though negligently caused, amounted to a deprivation." 101 S.Ct. at 1913.

6/ California Government Code § 810, et seq.

7/ A strong argument could be made that the defendants did in fact intend to deprive the plaintiff of his liberty. See Part IV infra.

8/ See note 5, supra.

9/ The defendants' reliance on the Attorney General's opinion is considered further in my discussion of the "good faith" defense, supra.

10/ According to defendant Seymour's job description, he "Plans, organizes, and directs the work and takes action on difficult problems in connection with ... the compilation of inmate case histories; directs the maintenance of individual inmates' files on a current basis; directs the review, evaluating, and summarizing of documents for

(Footnote 10 continued)

inclusion in records and case summaries and personally handles the more difficult cases directs the review, defining, and recording of terms and sentences shown in commitments and determines schedules on each case to carry out court orders and other legal and administrative provisions relating to the receipt, custody, and release of inmates; initiates and directs correspondence on legal and casework records; ... directs the computations necessary to determine legal date of parole and discharge of inmates...."

Similarly, defendant Cranke's job description states that he "Plans, organizes and assigns work and takes action on difficult problems in connection with ... the compilation of inmate case histories; directs the maintenance of individual inmates' files on a current basis; directs the review, evaluating, and summarizing documents for inclusion in records and case summaries and personally handles the more difficult cases reviews, defines and records terms and sentences shown in commitments and determines schedules on each case to carry out court orders and other legal and administrative provisions relating to the receipt, custody and release of inmates ... performs computations or supervises the making of computations necessary to determine the legal date of parole and discharge of inmates....

11/ The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

12/ Because the jury returned a general verdict, if one theory of liability is insufficient under the law a new trial may be required. Morrissey v. National Maritime Union, 544 F.2d 19, 26-27 (2d Cir. 1976); Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 967-68 (3d Cir. 1979); cert. denied 444 U.S. 833 (1980).

13/ Although it follows from this conclusion that the instruction given may have been more generous to the defendants than the law required, it did not result in prejudice to either party. Given that the eighth amendment claim was only an alternative theory or liability, and did not represent a separate item of damages, the instruction did not harm the plaintiff for he prevailed nonetheless. Obviously the favorable instruction did not prejudice the defendants.

14/ The meaning of the term "cruel and unusual" as it relates to this case is discussed at length in Part IV, Section C, infra.

15/ As I have already noted, the Johnson v. Duffy formulation is another way of expressing "legal cause." Once a proper instruction is given it is a question of fact for the jury to determine if the circumstances of the case are sufficient to meet the legal standard.

16/ Under this analysis the hiring of a doctor known to be incapable of maintaining the standard of care might well give rise to a claim under the eighth amendment even if the immediate cause of injury was that doctor's mere negligence.

17/ As I have pointed out in another context, the unfortunate phrase "burden of proof" has two distinct and oft-confused meanings. Kouba, n.1, supra, Slip Op. at 6. It may indicate who bears the burden of persuading the jury as to a given issue, or it may simply refer to a party's duty to produce enough evidence to make a prima facie showing. The reasoning in Gomez suggests that a defendant to a section 1983 suit bears both burdens when presenting an affirmative defense of good faith and reasonable conduct. The holding in Gomez, however, only reached the issue of the burden of production. (Justice Rehnquist wrote a brief concurrence specifically to emphasize that fact.) The better view is that the section 1983 defendant has both the burden of pleading and of proving his or her qualified immunity. See Nahmod, Civil Rights and Civil Liberties Litigation: § 8.13 (1979, with 1981 supplement), and cases cited therein. the instant case, the defendants have conceded in their briefs to the court that they bore the burden of persuasion as to this defense. Moreover, on the basis of the evidence presented, the defendants would not be entitled to judgment notwithstanding the evidence even if they did not bear the burden of persuasion as to this issue.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANK HAYGOOD, Plaintiff, v. EVELLE J. YOUNGER, etc., et al., Defendants.	No. Civil S-75-738 LKK ORDER

This is a civil rights action brought under 42 U.S.C. § 198 The plaintiff, Frank Haygood, was a prisoner at Folsom State Prison in California; due to a miscalculation by state officials, the plaintiff spent more than 4 1/2 years in prison after the state's authority to confine him came to an end. After he was released, the plaintiff brought

the instant lawsuit against a number of state functionaries whom he believed responsible for his unlawful confinement. The case was tried before a jury which found two of the defendants liable for causing the plaintiff to subjected to a deprivation of his constitutional rights.

I now consider various post-trial motions brought on by the parties. An accompanying, published opinion deals with the merits of the defendants' motion for judgment notwithstanding the verdict. In this opinion I shall address the question of the timeliness of that motion. I shall also discuss both the timeliness and the substance of several motions made by the plaintiff: a motion for a new trial on damages; a request for attorney's fees and a request for costs: and, lastly, a motion made before the Court of Appeals requesting

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that the defendants be required to pay the costs of their own transcript on appeal.

The facts regarding the plaintiff's unlawful incarceration are detailed in the California Supreme Court's opinion in In re Haygood, 14 Cal. 3d 802 (1975), and the facts and issues relating to the defendants' liability are discussed at length in the opinion which accompanies this order (Haygood v. Younger, _____ F.Su , Civil S-75-738 (E.D. Cal. November 30, 1981)). It is not necessary here to reiterate that material. What is pertinent, however, is some discussion regarding the procedural posture of this lawsuit. In particular, it is important to dissipate the apparent confusion regarding the entry of final judgment, for the date on which judgment was entered is obviously relevant to the disputes regarding the timeliness of the various post-trial post-trial motions.

I

THE PROCEDURAL HISTORY

On November 13, 1975, the plaintiff filed this action, seeking damages and declaratory relief pursuant to 42 U.S. C. § 1983 he also included a pendant state law tort claim for false imprisonment. There were originally 16 named defendants to the lawsuit: the State Attorney General; the Director of the State Department of Corrections: the nine members of the California Adult Authority; the Administrative Officer of the Adult Authority; the Warden of Folsom State Prisoner; a correctional counselor at the prison; a records officer at the prison; and a records officer for the Deparment of Corrections. The case was assigned to the Honorable Thomas J. MacBride, District Judge.

Over the next four years, Judge MacBride dismissed all of the claims save and

except the section 1983 cause of action for damages, which he let stand only against the Administrative Officer (Joseph Spangler), the Warden (Jacob Gunn), the correctional counselor (Richard Wipf), and the two records officer (Harold Cranke and Benjamin Seymour, respectively). In accordance with F.R.Civ.P. 54., no judgment was entered in favor of the defendants against whom all claims had been dismissed. Judge MacBride then assumed senior status; on Septmeber 5, 1979, the case was reassigned to the undersigned.

During the following year and a half, the parties brought several rounds of dispositive motions, and settlement and pretrial conferences were held. The case was tried before a jury commencing on June 2, 1981. At the close of the plaintiff's case-in-chief, this court directed verdicts in favor of defendants Spangler (the Administrative Officer), Gunn (the Warden),

and Wipf (the correctional counselor). On June 9, 1981, the jury brought in verdicts in favor of the plaintiff and against the remaining defendants Cranke and Seymour (the records officers). The jury declined to award punitive damages; it did, however, assess actual and compensatory damages in the sums of $640.00 against defendant Cranke and $1,450 against defendant Seymour.

After the verdicts were returned on June 9, 1981, the plaintiff made a motion for additiur, which was denied, as well as motions for attorney's fees and costs. The court, after soliciting both counsel's sugcestions as to the most efficacious way to proceed, directed the plaintiff to notice his motion for attorney's fees on the court's regular law and motion calendar and to submit a bill for his other costs in the manner prescribe by the local rules of this district.

On June 10, 1981, the Clerk of the Court, sua sponte, enter judgment in favor of plaintiff and against defendants Cranke and Seymour.

On June 15, 1981, the plaintiff filed a Notice of Appeal from Final Judgment (Ninth Circuit No. 81-4312). In this appeal, the plairtiff challenged various of Judge MacBride's rulings dismissing some of the plaintiff's original claims.

On June 17, 1981, the Clerk of the Court was reminded by counsel for the defendants that no judgment had been entered in favor of defendants Wipf, Gunn, and Spangler. The Clerk accordingly entered judgment on that date in favor of these aforementioned defendants and against the plaintiff. Neither this jud ment nor the June 10 judgment was entered pursuant to an order or this court.

On June 22, 1981, the defendants Cranke and Seymour noticed a motion for judgment notwithstanding the verdict pursuant to F.R.Civ.P. 50(b).

On July 24, 1981, the plaintiff, as directed by the court, noticed his motion for attorney's fees. On July 27, 1981, the plaintiff presented his (first) Bill of Costs.

At about this time it came to the court's attention that the Court Clerk's office had entered the June 10 and June 17 partial judments in this case. The court ascertained that the purported judgments were improper under F.R.Civ.P. 54, for, inter alia, they did not dispose of all the claims in the cases and, conversely, they did not meet the requirements of Rule 54(b) for final adjudication of fewer than all the claims in the. lawsuit. See Morrison-Knudson Co., Inc. v. Archer, 655 F.2d 962 (9th Cir.

1981). The court therefore determined on July 29, 1981, that the two purported judgments entered by the Clerk were "invalid and of no legal effect." In that same document the court ordered judgment to be entered against defendants Cranke and Seymour and in favor of the plaintiff, and judgment to be entered in favor of the other (14) defendants and against the plaintiff. This Order dated July 29, 1981, was the only time that this court ordered any entry of judgment in the present action.

On July 30, 1981, the Clerk of the Court attempted to enter judgment as directed by the court's order dated July 29, 1981. Unfortunately, the Clerk's Office made a clerical error and failed to include one of the sentences of the court's order.The Clerk subsequently corrected this error (apparently pursuant to F.R.Civ P. 60(a)), and issued an "Amended Judgment" on August 4, 1981.

On August 6, 1981, the plaintiff again noticed his appeal despite the fact that the defendants' motion for judgment notwithstanding the verdict was still pending in this court. (Ninth Circuit No. 81-4408). On August 14, 1981, the plaintiff filed an amended Notice of Appeal.

On about August 9, 1981, the plaintiff moved the Court o Appeals for an order compelling the defendants "to pay for their own record on appeal." (As the Court of Appeals explained, and as I shall reiterate below, this motion was apparently based on a misreading of both F.R.App.P. 10(b) and the Rules of the Unite States Court of Appeals for the Ninth Circuit).

On August 14, 1981, the plaintiff noticed a motion for a ne trial (as to damages only); the motion purported to rely on F.R.Civ.P. 59.

A motions panel of the Ninth Circuit Court of Appeals (hereinafter the "first motions panel") framed a sensible response to the assortment of untimely appeals and misconceived motions with which it was faced. On October 9, 1981, the Court of Appeals issued an order that (1) denied the plaintiff's motio to compel the defendants to pay for their own transcripts "without prejudice to the parties' right to present this controversy to the district court," (2) noted the possibility that the Court of Appeals lacked jurisdiction because the appeal was untimely filed, and instructed the parties to brief that issue, and (3) otherwise remanded the case to this court for the limite period of 42 days "to enable the district court to consider and rule on all pending postjudgment motions."

Nonetheless, a second order was issued by a second motions panel of the Circuit Court (hereinafter the "second motions panel") on Novmeber 10, 1981. In that order, the Court of Appeals announced that final judgment had been entered in the instant case on June 10, 1981, and that the appeal was "remanded to the district court with direction to vacate judgments entered on June 17, July 30, and August 4, 1981." The brief order did not explaineither the reasons for taking this action or its legal basis. The panel did state, however, that "[p]ursuant to the limited remand ordered by this court on October 9, 1981, the district court is vested with jurisdiction to rule upon all post judgment motions pending before it, including appellant's motion under Fed.R.App. P. 10(b) to compel appellees to pay for their own record on appeal."

Finally, on November 16, 1981, another order was issued extending the period of limited remand until November 30, 1981, so that this court would have sufficient time to evaluate the effect of the Court of Appeals' order dated November 10, 1981, and to obtain copies of the parties' briefs relating to the plaintiff's F.R.App.P. 10(b) motion.

II

THE CURRENT STATUS OF THE CASE

As the summary above suggests, there is a great and thoroughly unnecessary amount of confusion regarding the procedural posture of the instant action. This court had hoped to clarigy these matters in ruling upon the various motions and thus to spare the Court of Appeals the task. It now appears that the Court of Appeals will be forced to sort out the procedural details of this litigation. In an attempt to be of service to the Court of Appeals in this thankless

undertaking, this court respectfully offers the following comments regarding the status of the case at bar:

1. It would appear that the plaintiff's appeal (or appeals) from judgment in this case is (are) untimely and of absolutely no effect under F.R.App.P. 4(a)(4). That rule provide in pertinent part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judment under Rule 50(b) ... the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. (Emphasis added.)

In the instant case, the defendants have brought on a timely motion for judgment notwithstanding the verdict under F.R.Civ.P.

50(b)(see the discussion in Part III, below).Thus the notices of appeal filed by the plaintiff would seem to be without effect. The earliest that any party could appeal from the judgment - of the date of judgment -- would be today, November 30 1981, because it is only as of this date that the motion for judgment notwithstanding the verdict has been denied.

It would follow from this conclusion that the Court of Appeals never acquired jurisdiction over this litigation. In turn this would, of course, raise questions regarding the effect of the motion panels' determination on November 10, 1981, concerning the date of final judgment in the case.

Of course, it is for the Ninth Circuit Court of Appeals to determine its own jurisdiction; those questions cannot and should not be passed on by an inferior

court. Nonetheless, this court has been required to at least raise the issue in order to determine the limits of its own jurisdiction and the effect of the Circuit Court's various orders.

2. Presuming, as I do, that the second motions panel has decided that the appellant court had jurisdicition over the case, and meant to retain that jurisdiction even during the period of remand, I am still not confident that I apprehend the significance of the November 10, 1981, order. That order stated that "[t]he judgment entered on June 10, 1981, fully adjudicated the action as to all claims and parties remaining in controversy at that time and was therefore final. "At first blush this statement is difficult to reconcile with F.R.Civ.P. 54(b), which provides in part:

> When more than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the right and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the first place, the "judment" purportedly entered on June 10, 1981, was the sua sponte act of the Court Clerk; the act was not performed by order of this court nor was it done with this court's knowledge. "The mere entry of a notation by the clerk under Rule 58 does not create a judgment unless the court intended it to have that

effect. "Wright & Miller, Federal Practice and Procedure: Civil § 2651, p.11 (1973) (citing, inter alia, Steccone v. Morse-Starnett Products Co., 191 F.2d 197 (9th Cir. 1951)). This court can attest to the fact that it had no intention of entering a "final judment" in this action on June 10, 1981.

Second, the jugment entered by the Clerk of the Court only purported to resolve one claim against two defendants in a lawsu that, originally, involved several claims and sixteen defendants defendants.

Both the language of Rule 54(b), and the Ninth Circuit's recent decision in Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d 962 (9th Cir. 1981) teach that unless all the prerequisites of the rule are met, any purported adjudication "which adjudicates fewer than all the claims or the rights and liablities of fewer than all the parties

shall not terminate the action as to any of the claims or parties. . . ."

Once again, the Ninth Circuit is the authority on this issue. Of course, in accordance with the order of the second motions panel, this court will apply June 10, 1981, as the date of final judgment in this lawsuit. Nonetheless, the order leaves this court in a state of confusion: Has the panel, in some unspecified fashion, modified the holding that a judgment is not entered unless the trial judge so intends? Did the panel determine that the "judment" entered on June 10, 1981, actually -_ though silently -- adjudicated the rights and liabilities of all the parties defendant who were not mentioned therein? Does the panel mean to overrule the court's holding in the Morrison-Knuds case, or is that case to be distinguished from the instant lawsuit? The answer to these questions is urgent, not as an abstract

matter, but simply to assure that this court implements the law of the Circuit, not only in this case but in future cases as well.[1/]

3. As I shall explain, the order setting June 10 as the date of final judgment in this case does not seem to affect the disposition of the various postjudgment motions, with the possible exception of plaintiff's application for costs other than attorney's fees. The Court of Appeals' order makes it necessary nonetheless, to carefully evaluate the timeliness, as well as th substance of the various motions. Thus I shall address those motions seriatim, commencing with the defendants' motion for judgment notwithstanding the verdict.

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1. Since the Circuit's decision in Morrison-Knudson this court has directed the Clerk not to enter separate judments unless specfically directed to do so by the court. In light of the second panel's order I am uncertain whether this court instructed the Clerk properly.

III

THE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The substantive issues raised by defendants Cranke and Seymour in this motion are addressed in the companion published opinion; I conclude in that opinion that the motion lacks merit and must be denied. A discussion of the timeliness of this motion is not an empty exercise, however. As I have noted, a timely motion under F.R.Civ.P. 50(b) precludes either party from appealing the judgment in the lawsuit. Since this motion was brought pursuant to Rule 50(b), its timeliness or lack thereof has significant complications for the appeals taken by the plaintiff.

The jury returned its verdicts against defendants Cranke and Seymour, and was discharged on June 9, 1981. The Ninth Circuit has instructed this court that the

the date final judgment in the case is June 10, 1981. The defendants brought on their motion for judgment notwithstanding the verdict on June 22, 1981. The plaintiff contends that this motion is untimely for it was not brought within 10 days after the date on which the jury was dismissed.

Under Federal Rule of Civil Procedure 50(b), a motion for judgment notwithstanding the verdict must be brought on "[n]ot later than 10 days after entry of judgment...." The date of the jury's discharge is only relevant to this computation if no verdict was rendered in the lawsuit. Wright & Miller, Federal Prac tice and Procedure: § 2537 at p.601 (1971). The vital inquiry, therefore, is whether defendants made their motion within 10 day after June 10, 1981.

To make this determination we must turn to the rules for computing time as set

forth in F.R.Civ.P. 6(a). The applicable provisions of that rule are stated as follows:

> In computing any period of time prescribed or allowed by these rules . . . the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Once again, the time alloted defendants for bringing on their motion was 10 days from the day judgment was entered. That day - June 10, 1981 -- is not included in the designated period . The tenth day of the period, then, is June 20, 1981; that date, however, fell on a Saturday. Thus, the last day on which the defendants could file their motion for judgment notwithstanding the verdict under Rule 50(b) was the following Monday, June 22, 1981. That was in fact the

day on which the defendants filed their motion; thus the motion was timely made and could be considered on its merits by this court. See Jones & Laughlin Steel Corp. v. Gridiron Steel Co., 382 U.S. 32 (1965). By the same token, the plaintiff's appeal (or appeals) were noticed at a time not permitted under F.R.App.P. 4(a)(4), and should have no effect. (See discussion in Part II, above.)

IV

PLAINTIFF'S MOTION FOR A NEW TRIAL

The jury found defendants Cranke and Seymour liable to the plaintiff; in doing so it necessarily concluded that the said defendants were responsible, at least in part, for the final 16 to 17 months of the plaintiff's unlawful imprisonment. The total damages awarded by the jury, however, amounted to only $2,090.00. Thus the plaintiff has moved this court, in light of

the low figure awarded, to order a new trial solely on the issue of damages.

As matters stand, the motion is definitely untimely. The motion is based on F.R.Civ.P. 59; section (b) of that rule states that "[a] motion for a new trial shall be served not later than 10 days after the entry of judgment." As F.R.Civ.P. 6(b) makes clear, the court has virtually no discretion to extend or enlarge this 10-day period. 2 Moore's Federal Practice ¶6.07[1] (1981 ed.); Wright & Miller, Federal Practice and Procedure § 1167 (1969). In the instant case the date of final judgment has been fixed as June 10, 1981; the plaintiff, however, did not bring on his motion until August 14, 1981, more than 60 days later. The court, therefore, is not empowered to consider the substance of the motion.

Even if the Court of Appeals did not set June 10, 1981, as the date of final

judgment, however, the plaintiff's motion would be denied. First of all, the defendants present a persuasive argument to the effect that the motion was untimely made made in any case. Judgment was entered by order of the court on July 30, 1981; the plaintiff brought on his motion more than 10 days after the entry of that judgment as well. The plaintiff however, contends that the date of final judgment is the case is August 4, 1981, that is, the date on which the Clerk of the Court entered an Amended Judgment to correct a clerical error. In response, the defendants argue that F.R.Civ.P. 60(a), which empowers the court to correct clerical errors at any time, is a housekeeping provision that in no way impairs the finality of judgments. 6A Moore's Federal Practice ¶60.03[1] (1979 ed.). Thus, the defendants argue, the statutory 10 day

period could no have been enlarged by the Clerk's amendment of the the judgment.

Without pausing to decide this hypothetical timeliness problem, I will observe that the plaintiff's motion would almost certainly fail on the merits. There is ample precedent for granting a new trial limited to the question of damages. Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968), cert. denied, 397 U.S. 1036 (1970); Brown v. Richard H. Wacholz, Inc., 467 F.2d 18 (10th Cir. 1972); 6A Moore's Federal Practice ¶¶59.06, 59.08[6] (1979 ed.). As Wright and Miller noted, however, '[t]he court is not free to set aside the verdict merely because the judge might have awarded a different amount of damages, but it may do so if the proceedings have been tainted by appeals to prejudice or if the verdict, in the light of the evidence, is so unreasonable that it would be unconscionable

to permit it to stand." Wright and Miller, Federal Practice and Procedure § 2807 at pp. 51-52 (footnotes omitted); See also Southern Pacific Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951), cert.denied 341 U.S. 904 (1951).

I have no doubt that I would have awarded more in damages than did the jury. What the court would have done, had it been the trier of fact, is not the issue, however. I cannot say that the verdict rendered as to damages is unconscionable in light of the evidence presented.

The jury had the unenviable task of unenviable task of quantifying the damage that 16-17 months of unlawful confinement caused to a man who ha been lawfully confined for decades. Neither the law nor the arguments of counsel provided much of a compass for the jury to chart their course. True, plaintiff's counsel did prove that the plaintiff had been kept in prison after his

term ended; counsel also presented evidence displaying the wretched quality of life in prison. Counsel did not, though, provide the jury with any solid means of translating the deprivation suffered by the plaintiff into a dollar figure, nor was evidence presented as to actual damages suffered by the plaintiff. In short counsel did not present any economic evidence to the jury. The exception, perhaps, was closing his speech, in which he said;

> If you take the average citizen he earns about $15,000 a year; divided by 365 days it only comes out to about $4.00 a day [sic]. Now we all know that is a ridiculous figure as far as one day of freedom is concerned. A day of freedom is measured by a different standard.

Regretably, counsel never expicated that "different standard." The jury may well have based its award on the only solid figure provided by the plaintiff: the damages it awarded approximated $4.00 per day for every

day of unlawful imprisonment for which the defendants could be held responsible.I ccnclude that the jury's award was not a shocking, nor even a thoughtless response to the evidence presented.

V

PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

At the close of trial, the plaintiff moved for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). Section 1988 provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] ... 1983 ... of this title, ... the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

The defendants raise an array of objections to the attorney's fee request. The significant of those objections are that (1) plaintiff's application for attorney's fees was untimely; (2) the plaintiff is not

entitled to attorney's fees under the statute; and (3) even if the application was timely, and attorney's fees are in order, the plaintiff's request is grossly excessive. As I shall explain, the instant application should not be barred for untimeliness, and this is an appropriate case for awarding attorney's fees. There is merit, however, to many of defendants' exceptions to the amount of fees requested by the plaintiff. Thus the court will award attorney's fees to the plaintiff, but a substantially lower amount than he requested. Before turning to the more weighty issues raised by the defendants, however, I will address one of their subsidiary claims.

A. Defendants' Request for an Evidentiary Hearing

The defendants insist that they are entitled to an evidentiary hearing on the amount of fees to be awarded to plaintiff.

The short answer is that, in this Circuit, there is no such "right" to an evidentiary hearing on this matter. Manhart v. City of Los Angeles, Dept. of Water & Power, ___F.2d___, No. 79-3225, Slip op. at 3894 (9th Cir. August 7, 1981); Williams v. Alioto, 625 F.2d 845, 849 (9th Cir. 1980). Nor do I think that an evidentiary hearing is necessary in this particular case. This court is well enough acquainted both with the details of this case and with the norms of the legal profession to evaluate the claims made by the plaintiff and the exceptions raised by the defendants. While there can hardly be too much data in this sort of situation I am confident that I have been presented with sufficient information to decide the matter before me. Finally, the defendants argued that "[t]here is no rush for a final judgment on the fee application." Since that argument was made, however, the

Court of Appeals has imposed a very definite limit on the amount of time this court can devote to considering the matter. This time limit simply did not allow for the kind of hearing demanded by the defendants.

B. The Timeliness of Plaintiff's Application

On June 9, 1981, at the close of trial, the plaintiff orally moved for attorney's fees. At the request of defendants' counsel, the court instructed the plaintiff to bring on a motion on the court's regular law and motion calendar. The plaintiff noticed said motion on July 24, 1981, and argument was heard on the motion on August 31, 1981.

The defendants contend that the motion was untimely because it was noticed more than 10 days after the date of final judgment in the case. The defendants start from the premise that, under 42 U.S. C.

§ 1988, attorney's fees are considered "costs;" thus application for such fees must be made in the manner provided for in the relevant local rule of court. In this regard, the defendants rely on Obin v. Dist. No. 9, Int'l Assoc. of Machinists, 651 F.2d 574 (8th Cir. 1981). Local Rule 122 provides in pertinent part:

> Within 10 days after notice of entry of a judgment under which costs may be claimed, the prevailing party may serve on the adverse party and file a motion to tax costs.

Under the second motion panel's order the entry of judgment in this action was on June 10, 1981; the plaintiff did not notice his motion until July 24. Thus the defendants argue that the motion was noticed too late, and is untimely, and that the application must be denied.

The answer, of course, is that the motion was made, in court, on June 9, 1981,

and was in no sense too late to be considered. The defendants respond, in effect, that if that is the case the motion was made too early, for the local rule requires the motion for local rule requires the motion to be filed "after notice of entry of ... judgment." For several reasons, this hypertechnical attempt to defeat the plaintiff's motion must fail.

First of all, it is by no means clear that a motion for attorney's fees must always be made in the manner prescribed for presentation of a bill of costs. According to the only authority in this Circuit cited by the defendants: "Under Fed.R. App.P. 39(d), a bill of costs must be filed within -14 days of entry of judgment. Though attorneys' fees may be awarded as part of a bill of costs, they may be requested separately and need not be requested within the 14-day period, at least in the Ninth

Circuit." Suzuki v. Yuen, 507 F.Supp. 819, 823 n.5 (D.Hawaii 1981 (Emphasis added).[2/]

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2. Here, of course, the Suzuki court was discussing appellate procedure. It is nonetheless hard to reconcile this quote with the earlier passage relied on by the defendants, in which the court says: "Plaintiffs therefore moved for award of attorneys' fees within the ten-day period after final judgement required under Fed.R.Civ.P. 59(e). See White v. New Hampshire, 629 F.2d 697 (1st Cir. 1980) . . . ." Suzuki v. Yuen, 507 F.Supp. 819, 821 n. 2 (D. Haw. 1981). The White case, as the citation suggests, holds that attorney's fees are not costs, but rather are part of general run of controverted issues resolved within the contours of a court's final judgment.'' 629 F.2d at 703. Thus, the court in White required that all motions for attorney's fees be noticed within ten days of entry of judgment if not sooner. The rule in White is not the law of this circuit; most circuits that have considered the question have rejected that rule. Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981); Johnson v. Snyder, 639 F.2d 316 (6th Cir. 1981); Jones v. Dealers Tractor and Equipment Co., 63 F.2d 180 (5th Cir. 1981); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980). Nor Nor is it clear from the language in Suzuki v. Yuen whether the court was adopting the White rule or merely making an observation. Nonetheless I note that the plaintiff's motion for attorney's fees would be timely, for it was made before final judgment was entered, and any delay is attributable to reasonable reliance on this court's directions.

Second, I do not conclude that the plaintiff violated Local Rule 122. The better view, and the one to which this court subscribes, is that the court is bound to adhere to its own rules. See, Wright & Miller, Federal Practice and Procedure § 3153, p. 224 (1973). The corollary, however, is that "the court that adopted the local rule is the best judge of its meaning." Id. at 225. It is apparent, using standard rules of construction, that Local Rule 122 is directory, rather than mandatory in character, and does not set out the exclusive manner in which a party can apply for costs.It states that a party "mav." file a motion in the time and manner provided; if the party complies he or she may not be challenged for filing untimely. Dickinson Supply, Inc. v. Montana-Dakota Utilities Co., 423 F.2d 106, 110 (8th Cir. 1970). Rule 122 does not purport to, nor should it be

read to preclude the parties from making application in an alternative manner whic accords with the purpose of the rule. The purpose of the rule, obviously, is to bring litigation to a prompt and orderly close; while this purpose may be defeated by a motion brought on too late, such is not the case when a motion is brought on "early," and is disposed of in a manner determined by the court and agreed to by the parties.

Third, unlike other, simil.ar local rules, Rule 122 does not provide that costs not timely claimed are "waived. "See, e.g., Dickinson Supply Inc. v. Montana-Dakota Utilities Co., 423 F.2d at 110.The only sanctions for noncompliance with Rule 122 are found in Local Rule 5, which allows the court discretion to appl such sanctions as are "authorized by statute or rule...."Thus, even if the plaintiff was required to comply with

Local Rule 122 and failed to do so, he still is not automatically precluded from recovering attorney's fees. That is a matter within the discretion of this court, and this court is not inclined to exercise exercise its discretion on the manner suggested by the defendants. If the plaintiff did bring on his motion untimely, he did so at the behest of the court. It would be patently unfair for the court to so severely penalize the plaintiff for doing what i told him to do. Thus even in situations where the time limits for making a motion are clear, and the trial court has no authority to extend those limits (e.g. a motion for new trial under F.R.Civ.P. 59), the courts have treated untimely motions as timely brought when the tardiness of the motion was caused by the trial court.See, Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964); 6A Mooore's Federal Practice ¶ 59.09 [3] at

213-215. The Ninth Circuit has held that an untimely bill of costs must be considered by the court if the untimeliness was caused by reasonable reliance on a statement made by the Clerk of the Court.Research Ecuity Fund, Inc. v. Insurance Co. of North America, 597 F.2d 1266 (9th Cir. 1979).It follows, a fortiori, that a court must consider costs that are filed in the manner directed by that court, whether timely or not. Finally, and most critically, the defendants can show no prejudice from the court's entertaining the "premature" motion.

I conclude, therefore, that the plaintiff's motion for attorney's fees was timely made and must at any rate be con sidered by this court.

C. The Appropriateness of Attorney's Fees

The defendants next make a series of arguments all to the effect that this is not

an appropriate case for awarding attorney's fees under 42 U.S.C. § 1988.I do not find these arguments persuasive.

First, defendants contend that plaintiff is not entitled to attorney's fees "since the instant case was essentially a tort action for money damages," and is not the sort of litio-atio that 42 U.S.C. § 1988 was designed to encourage. The extended discussion of plaintiff's case that is found in the accompanying published opinion should make at least one point quite clear: this lawsuit is not simply a tort action for false imprisonment or negligence. The plaintiff alleged and proved that the defen dants caused him to be deprived of rights guaranteed by the fourteenth amendment; the issues involved are far more complex and significant than those posed by a simple tort action.

Similarly, the claim that "plaintiff's action conferred no great benefit on society nor did it establish a precedent which would affect large numbers of people" misses the park. To begin with, we have the testimony offered by the defendants' witness to the effect that no other records officers would have done more than the defendants did to investigate the plaintiff's meritorious claim that he was entitled to be released. One hopes that this lawsuit will have some impact on the standard of conduct of officials who are charged with releasing prisoners whose sentences have run. Furthermore, the issues raised in this litigation were sufficiently fresh and important that this court thinks it worthwhile to publish its conclusions. Whether that precedent will "affect large numbers of people" renains to be seen.

The defendants' reliance on Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979) is misplaced. In Buxton, the Ninth Circuit held that a District jud-oe did not abuse his discretion when he refused to award attorney's fees. The Court noted that, in that case, the plaintiffs had no difficulty attracting "competent counsel who were undeterred by the prospect of having to look to the [plaintiffs] for payment of their fees. Moreover . . . adequate compensation to counsel was provided from the recovery. 595 F.2d at 1185. In the instant case, it cannot be said that a man who has spent decades of his life in prison is the sort of "sympathetic plaintiff" who would easily attract counsel willing to work on a contingent fee basis. It was quite likely that, would not even if he did prevail, the damages awarded would not provide adequate compensation to counsel; clearly they did

not. Most important, the court emphasized in Buxton that it was deferring to the broad discretion of the trial judge. In a more recent case, much closer on both facts and law to the instant action, the Ninth Circuit affirmed the trial court's discretion to award damages to a man who had been unlawfully incarcerated. Smiddy v. Varney, ___F.2d___, Nos. 79-3078, 79-3480, Slip op. at 3837 (9th Cir. August 7, 1981). Thus this court must exercise its discretion, relying on earlier cases not for their results but for the principles they articulate.

As the Ninth Circuit has made clear, the star which must guide this court in exercising its discretion is the purpose underlying 42 U.S.C. § 1988. "... Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Award Act

must be liberally construed to achieve these ends. 'In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.'" Dennis v. Chang, 611 F.2d 1302 1306 (9th Cir. 1980) (quoting S.Rep.No. 94-1011, 94th Congress, 2d Sess., 3 reprinted in [1976] U.S. Code Cong. & Ad.News 5910. The approach suggested by defendants could effectively preclude former prisoners and other "unsympathetic plaintiffs" from litigating constitutional claims, for attorneys could not risk the necessary months and years of work on what could turn out to be an insignificant damages verdict. This result cannot be squared with the broad remedial purposes of the statute. The statute is not designed to reward attorneys for winning high verdicts; it is meant to encourage them to sue on meritorious constitutional claims.

The defendants' other arguments in this regard can be dispatched rather more quickly. They contend that the small amount of damages awarded by the jury was no more than "nominal damages and that the plaintiff is not, therefore, a "prevailing party" within the meaning of 42 U.S.C. § 1988. The defendants cite no case authority for the novel proposition that a plaintiff has not prevailed unless he has won a large damages award. In fact, it is well established in this Circuit that "[p]laintiffs should be considered prevailing parties so long as they prevail on 'a significant issue in litigation which achieve[d] ... the benefit which the parties sought in bringing suit. '"Manhart v. City of Los Angeles, Dept, of Water & Power, supra at 3893 quoting Williams v. Alioto, 625 F.2d 845, 847 (9th Cir. 1980) cert. deni U.S., 101 S.Ct. 1123 (1981), quoting Sethy v. Alameda County Water

District, 602 F.2d 894, 897-98 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980). See also Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). There is no doubt that the plaintiff did prevail on the central issue in this lawsuit he proved that he had been deprived of his constitutional rights, and that the defendants had caused that deprivation. The defendants may not now parlay a favorable result (from their standpoint) as to damages into a ruling that they were the "prevailing parties" in the lawsuit.That the damages awarded were modest, and that the plaintiff's counsel may have been in part responsible for that result, is something that will be considered in calculating the amount of attorney's fees awarded. The low damages figure, however, does not in itself require the court to deny the applic tion for fees entirely.

D. The Amount of Fees to be Awarded

Plaintiff prays the court to provide fees for his attorney's services in the amount of $57,731.25. In addition, plaintiff requests $18,187.50 in paralegal fees: thus he requests a total of $75,918.75. Because the paralegal fees are presumably a fixed cost, as opposed to payment for professional services; and because different considerations go into calculating those fees, I shall address the question of appropriate paralegal fees separately.

First, however, I shall turn to the calculation of the attorney's fees per se. As I shall explain, the sum requested by the plaintiff is entirely too high and, accordingly, must be reduced. The Ninth Circuit has instructed this court as to the twelve relevant factors that must be considered in determining the amount of

attorney's fees to be awarded. Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied su nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976); See Johnson v. Georc.ia Highway Express, 488 F.2d 714 (5th Cir. 1974). By applying these factors to the case at bar, I shall analyze the claim and arrive at an appropriate figure.

1. Time and Labor Required

Plaintiff's counsel states that, between 1975 and the present, he devoted a total of 728.75 hours of professional services to the instant lawsuit. He asks recompense at the rate of $75.00 per hour for work done outside of court (643.75 hours) and $100.00 per hour for court time (104.75 hours). In addition he requests $50.00 per day for travel and per diem living expenses for the total of 21 days spent away from his

offices in Santa Cruz, California. The defendants make a number of objections to this calculation.

On the whole, the hours of work claimed by plaintiff's counsel appear to be fair and reasonable. The defendants object to particular entries in plaintiff's counsel's detailed, yearby-year breakdown. I have carefully reviewed these entries and conclude that the time spent by counsel on the specific motions, items of discovery, etc., was not unreasonable. The few irreconcilable entries noted by the defendants are readily explicable as the result of clerical errors.

At least one objection raised by the defendants has merit, however. As they point out, plaintiff's counsel "rounded off" all time spent on the case to the next highest quarter of an hour. Thus, if counsel (or the paralegal) spent 12 minutes on some

matter involved in the case, he entered .25 hours in his records; if he spent 22 minutes he entered .50, etc. This system, of course, always accrues time to the benefit of the person making the entry. Plaintiff's counsel responds that such rounding off is not an unconventional method of record keeping in private practice and indeed it is not. The favored method, however, is for the attorney to record his time by dividing the hour into 10, rather than 4 parts; this system is far more equitable for the client. A commercial client, dissatisfied with counsel's method of keeping records, retains the option of going elsewhere. The court, in calculating fees post hoc, does not enjoy that option.I conclude, therefore, that the number or hours claimed by counsel should be reduced by a factor of 10% to compensate for the inflation due to his method of keeping records.

Finally, I note the arguments tendered by the defendants to the effect that counsel should only be awarded fees for those claims on which he prevailed. Because, as I explained in Part I, supra, the plaintiff prevailed on only a small portion of his original complaint, this would mean a radical reduction in the number of hours for which counsel could receive fees. In two recent cases, decided on the same day, the Ninth Circuit specifically disapproved the approach advanced by the defendants In Manhart v. City of Los Angeles, Dept. of Water & Power, .F , No. 79-3225, slip op. at 3895-96 (9th Cir. August 7, 1981), the Court resolved the issue thusly:

> The award cannot be deemed excessive because it included fees for time spent in preparing those claims dismissed by the district court. It is true that no compensation may be paid for the time spent to prepare unrelated claims on which plaintif-s did not prevail. [] In this case, however,

> plaintiffs pursued several claims to remedy the same injury, gender discrimination. Under those circumstances, plaintiffs are entitled to an award for all time spent in pursuit of their ultimate goal.

And, in Smiddy v. Varney, ___ F.2d ____, Nos. 79-3078, 79-3480, Slip Op. at 3837 (9th Cir. August 7, 1981), the Court upheld an award of total attorney's fees in a case in which claims were dismissed against several of the defendants. In the instant case, all of the claims were pursued by the plaintiff to remedy the same constitutional injury: the unlawful confinement in derrogation of his rights under the fourteenth amendment. Thus the fact that some claims were dismissed does not provide a basis for reducing the number of compensable hours or the amount of fees awarded.

2. The Novelty and Difficulty of the Legal Questions Involved.

The defendants contend that the novelty and difficulty of the questions

involved in this case do not warrant an upward adjustment of the figure presented by plaintiff's counsel. I disagree. As I discuss in detail in the companion opinion, this case involved novel and extremely complex issues regarding the nature of the statute under which it was brought (42 U.S.C. § 19 and the state of mind requirements (if any) implied into the plaintiff's cause of action by the underlving constitutional claims. In addition, the case involved complicated issues regarding the immunities from suit claimed by the various defendants. In several respects, this case presented issues that are at the frontier of civil rights litigation. On this basis, I would increase the award to plaintiff's counsel. As I shall explain, however, this increase is more than offset by the reduction for the results obtained by counsel.

3. The Skill Requisite to Perform the Legal Services Properly.

Both because of the difficult legal issues involved, and because of the troublesome question of the damages involved, the case required a high level of skill if it was to be handled properly. I cannot say, however, that plaintiff's counsel consistently displayed that highest level of requisite skill. Although his briefing and other "paper" work was generally adequate, his presentation to the jury was not at the same level. Even if the out-of-trial effort generally justifies an award at the high level sought, I believe a reduction is justified overall. Moreover, I do not believe that counsel's trial performance justifies the higher hourly figure he claims for court time. Hence, all his work will be figured at the same rate, regardless of whether it was spent in or out of court.

4. Preclusion of Other Employment Due to Acceptance of the Case.

I do not think this a particularly significant factor in the present case.I do note counsel's dedication to this case.

5. The Customary Fee

Counsel sets his fee at $75.00 for time spent on the case generally, and $100.0 for time spent in court. These figures are not in themselves unreasonable. Nonetheless for the reasons previously stated, all time spent on the case will be figured at the sam base rate of $75.00 per hour.

I note that $75.00 per hour would have been a very high attorney fee in 1975.However, the fee is being paid in 1981 rather than in 1975 when the services were rendered. Due to the general inflationary trend in our society, paying counsel today i 1975 dollars would simply not compensate him. There are two avenues available to the court

in this regard. First, I could calculate the appropriate fee based in part upon a reasonable rat in 1975 and then add an inflation factor. See Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., Inc., 406 F.Supp. 828, 834-35 (N.D. Cal. 1976); Parker v. Califano, 443 F. Supp. 789, 793 (D.D.C. 1978). Alternatively, I could simply award fees based upon a currently reasonable rate. See Manhart v. City of Los Angeles, Dept. of Water & Power, supra, slip op. at 3894-95. The two methods of calculation are equally just and fair. Therefore, because the latter is more direct, I decline to follow defendants' suggestion that I calculate counsel's compensation on a year-by-year basis.

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6. The Contingent Nature of the Fee

Counsel states rhat hetook this case on a contingent fee basis and did so primarily because the case was interesting and because he thought an injustice had been done the plaintiff. Frankly, I give credence to these assertions. As I have explained, due to the nature of the injury and the plaintiff's record, there was a significant possiblity that the damages ultimately awarded would provide little compensation either for the plaintiff or his counsel. Under the circumstances, however, my view is that the contingent fee arrangement is not significant in either direction.[3/]

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3. In this regard I note the fact, presented by both sides, that the contingent fee arrangement between plaintiff and his attorney extends to the attorney's fees awarded as well. Having noted the fact, I shall disregard it, for I do not think it a proper consideration for this court.

7. Time Limitations Imposed

This factor is not relevant to the instant case for there is no indication that either the client or the circumstances im posed any applicable time limitations on counsel.

8. The Amount Involved and the Results Obtained.

This factor is of great significance in the instant case. While the plaintiff did prevail on the issue of liability, the damages he was awarded -- $2,090.00 -- are minute in comparison with the fees prayed for by his attorney. I have noted that the jury may have been unwilling to award substantial damages in this case in any event. I have also noted, however, that counsel's minimal (and inaccurate) presentation on the issue of damages may have been part of the reason that the verdict awarded to plaintiff was so low. Thus this factor commends a drastic reduction

in the amount of fees awarded to plaintiff's counsel.

9. The Experience, Reputation and Ability of the Attorney.

According to his resume, counsel is a moderately experienced attorney with a strong background in public interest and civil rights law and litigation. I know not of his reputation. His abilities have already been discussed.

10. The "Undesirability" of the Case

This factor, too, has been discussed.Suffice it to say that the case was a difficult and demanding one, and that the plaintiff's background made it less than desirable for an attorney with an eye fixed on "the bottom line." On the other hand, there was no question that the plaintiff haa suffereda grave deprivation, and an experienced attorney may have been sanguine about obtaining a more favorable result. On

the whole, this factor supports a substantial award of attorney's fees.

11. The Nature and the Length of the Professional Relationship.

Neither party has suggested that this factor is relevant to the amount of fees in the instant case.I note, however, that there does not appear to be much possibility that plaintiff's counsel received other significant, fee-generating work from the plaintiff in consideration for having represented plaintiff in the present lawsuit.

12. Awards in Similar Cases

The parties did not favor the court with any information in this regard.

CONCLUSION

Counsel for the plaintiff avers that he has spent a total of 728.75 hours working on the instant lawsuit. This figure properly includes time spent litigating the issue of fees itself Manhart v. City of Los Angeles,

Dept. of Water & Power, supra, slip op. at 3896; Williams v. Alioto, 625 F.2d at 850. Because ofcounsel;s method of keeping records, I reduce that figure by 10%, to a net of 655.875 compensable hours.

Counsel requests payment at the rate of $75.00 per hour for time spent on the case outside of court, and S100.00 per hour for time spent in court. For the reasons stated, I will calculat all of his compensable hours at the basic $75.00 rate.

The resulting base (or "lodestar") figure is $49,190.25. The novelty and difficulty of the issues involved, the protractec nature of the litigation, and the relative undesirability of the case would, in themselves, lead me to add approximately 35% onto the lodestar figure. See Manhart v. City. of Los Angeles, Dept. of Water & Power, supra.

The skill displayed by counsel and, most importantly, the amount and the result obtained by counsel would, in themselves, lead me to reduce the lodestar figure by 65%. See Smiddy v. Varney, supra.

Based on all the factors considered, and in view of the broad remedial purposes of the Attorney's Fees Awards Act, I reduce counsel's lodestar figure by 30%.

Thus the fees awarded to plaintiff's counsel, as attorney for the prevailing party in this litigation, are set at $34,433.17.

To this sum I add 21 days of travel and per diem living expenses claimed by counsel at the reasonable rate of $50.00 per day, or a total of $1,050.00. Thus the fees and personal expenses awarded to plaintiff's counsel total $35,483.17. This leaves only the amount of paralegal fees to be calculated.

E. The Amount of Paralegal Fees

Plaintiff claims that Phillip Gaskill, the paralegal working on this case, devoted 689.5 hours to the instant lawsuit plaintiff requests compensation for Mr. Gaskill's services at th rate of $25.00 per hour. In addition, plaintiff requests a travel and per diem allowance of $50.00 per day for the 20 days that Mr. Gaskill traveled from Santa Cruz, California to the federal courthouse in Sacramento, California.

Fee awards for services rendered by paralegals and law clerk have consistently been approved by the Ninth Circuit. Manhart v. City of Los Angeles, Dept. of Water & Power, supra, slip op. at 3894 n.2; Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc. 526 F.2d 1196, 1210 n.19 (9th Cir. 1975), cert. denied 425 U.S. 959 (1976). Moreover, the rate requested by plaintiff -- $25.00 per hour -- was used as

a base rate in Manhart as well, and the court's experience confirms that the figure is not an unreasonable one. One judge has cautioned that "[a]ny element of profit must ... be excluded from the [paralegal fees] award," Chapman v. Pacific Telephone & Telegraph Co., 456 F.Supp 77, 83 (N.D. Ca.l.. 1978). In this case, however, there is no indication that the paralegal fees requested represent any element of profit for the plaintiff or his attorney. By that same token, it would make little sense to include the cost of paralega fees in the attorney's "lodestar" figure when adjusting that figure according to the factors reviewed above.

The hours claimed, however, are more problematic. First of all, the defendants point out that the hours claimed for the paralegal's work are mirrored exactly by the hours that the attorney claims to have worked on the same task. Thus, defendants claim,

the paralegal's services are merely duplicative and should be disallowed. It is far from uncommon, though, for attorneys and paralegals to work in tandem on projects such as those listed by the plaintiff. It would be far more surprising if, for instance the paralegal was given sole credit - or drafting a complaint or responding to interrogatories. I conclude that the defendants' accusations of waste and duplication are greatly exaggerated. They are not groundless, however; my review of the hours reported by the attorney and the paralegal leads me to believe that some of their parallel efforts were in fact duplicative, or at least excessive. On that basis, I reduce the number of compensable paralegal hours by 10%.

Second, I note that among the hours claimed for Mr. Gaskill is time spent in court, or traveling to and from the courthouse. If professional services were

rendered at those times, however, they must have been rendered by plaintiff's attorney; while it may be convenient to have a paralegal in court, I cannot see any way in which it was necessary. For this reason, I disallow all court and travel time claimed for Mr. Gaskill, as well as the per diem and travel allowances.

Finally, I note that the infirmity in the attorney's method of keeping records applies with equal force to the records kept of the paralegal's work time. I thus discount the hours claimed for Mr. Gaskill by an additional 10%.

CONCLUSION

Plaintiff requests compensation for 689.5 hours of paralegal services.I disallow 194..5 of those hours which were spent either in court, traveling to and from court, or taking depostions. What remains is 495 compensable hours; from this remainder I

deduct 10% for apparent duplication of efforts, and 10% to set off plaintiff's counsel's overly generous record keeping. This leaves a net of 396 compensable hours; multiplied by the hourly rate of $25.00 I arrive at a total of $9,900.00 in paralegal fees.

TOTAL

The court hereby awards plaintiff the amount of $45,383.17 as attorney and paralegal fees.

VI

PLAINTIFF'S MOTION FOR COSTS

Plaintiff has presented a bill for costs, other than attorney's fees, in the sum of $996.14.I note that the bulk of the taxable costs claimed by the plaintiff is comprised of a claim for $591.51 in fees for an expert witness who was never called to testify. This hardly sees to meet the requirement that "[t.lo be taxable as costs

the witnesses' testimony must be material to an issue tried and reasonably necessary to its disposition. "United California Bank v. THC Financial Corp., 557 F.2d 1351, 1361(9th Cir. 1977).I do not reach the appropriateness of the costs claimed, however, because I conclude that the plaintiff's bill of costs was filed untimely.

Like his motion for attorney's fees, plaintiff's motion for costs was made orally at the close of trial. Unlike the motion for attorney's fees, however, the motion for costs was not supposed to be noticed and heard on the court's regular law and motion calendar.Instead the court directed plaintiff to file his cost bill "in the ordinary way, as provided by the Local Rules. As I have explained, Local Rule 122 clearly provides for a time and a method for filing costs. Specificially, the rule states the prevailing party may serve and file a motion

for costs withi 10 days after notice of entry of judgment. In this case, entry of judgment was noticed on June 10, 1981; the plaintiff did not file his bill of costs until July 27, some six weeks later.

The reasons why the motion for attorney's fees was not untimely are of no aid to the plaintiff in this context. Although, as I stated, Local Rule 122 is not a mandatory. rule, its provisions became mandatory when the court directed plaintiff's counsel to file his bill of costs in compliance with that rule. Moreover, the plaintiff's failure to timely file was not the resu.lt of a reasonable reliance either on the court itself or on the Clerk of the Court. See Research Equity Fund, Inc. v. Insurance Company of North America, 597 F.2d 1.266, 1267 (9th Cir. 1979). On the contrary, the plaintiff obviosuly believed that June 10, 1981, was the date of final

judgment, for he noticed his appeal but five days later. Even if the plaintiff was misled by the Clerk's subsequent notice of entry of judgment not have filed his bill of costs by June 27 instead of July 27, 1981. Indeed, the only reason why the plaintiff's costs were untimely is that the plaintiff's counsel failed to attend to the necessary details.

Finally, in discussing the timeliness of the attorney's fees motion, I noted that Rule 122 does not automatically disallow costbills that are untimely filed; rather the sanctions to be taken are left to the discretion of the court by Local Rule 5. I noted there that I was not inclined to disal-.low the motion for attorney's fees, for I felt that the objections raised to the timeliness of that motion were mere formalisms, and erroneous ones at that. In this context, however, I am inclined to refuse the plaintiff's application for costs,

for there was simply no excuse for the extreme tardiness in the filing. The plaintiff's application for costs is denied. See United California Bank v. THC Financial Corp., 557 F.2d at 1361; Baldwin v. Redwood City, 540 F.2d 1360, 1375 n.43 (9th Cir. 1976).

VII

PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO PAY FOR THEIR OWN TRANSCRIPT ON APPEAL

The plaintiff brought on a motion before the Court of Appeals, requesting that court to order the defendants to pay for their own transcript on appeal. In its order dated October 1981, the Court of Appeals denied that motion "without prejudice to the parties' right to present this controversy to the distric court." In its order dated Novmeber 10, 1981, the Court of Appeals emphasized that this court is currently vested with jurisdiction to rule on the

instant motion. As I shall explain, I do not think that any mcoion regarding transcripts on appeal is Poroperly before either this court or the Court of Appeals.

I can do little more than reiterate what the Ninth Circuit held in its order of October 9, 1981. Ninth Circuit Rule of Court 4(c) provides that "[i]n civil appeals, the reporter's transcript shall be designated as provided by Rule 10(b) of the Federal Rules of Appellate Procedure."According to Fed.R.App.P. 10(b),

> (1) Within 10 days after filing the notice of appeal the appellant shall order from thereporter a transcript of such parts of the proceedings ... as he deems necessary .... (3) Unless the entire transcript is to be included, the appellant shall, within the 10 days provided ... file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy ... of the statement. If the appellee deems a transcript of other parts of the proceeding to be necessary, he shall, within 10 days after the service of the ... statement of the

> appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appel lant to do so. (4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

Put in simple terms, plaintiff was required to serve on the defendants a statment of the issues he intended to raise on appeal within 10 days of filing the appeal. Apparently the plaintiff failed to do this in a timely manner. If the defendants wished the plaintiff to order additional part of the transcript, they could designate which portions they wanted the plaintiff to order. Apparently the defendants did this, although it is not clear whether they acted in a timely manner. If the plaintiff failed to

order the transcripts designated by the defendants -- and the plaintiff failed to do so -- the defendants had two options. First, they could order the transcript portion themselves; but this would also mean that they would have to pay for it themselves. Second, they could bring on a motion in this court to compel the plaintiff to order (and thus to pay for) the designated portions.

To the best of this court's knowledge, the defendants did not exercise either of their options. I can say with confidence that no motion to compel the plaintiff to order portions of the transcripts was ever noticed in this court. Given that the defendants never took the appropriate procedural steps to compel plaintiff to order their portions of the transcript, the plaintif motion is an unnecessary response to an (as yet)

non-existent problem. Plaintiff's motion to compel the defendants to pay for their own transcript on appeal (if such a motion is before this court) must be denied for it does not concern any presently justiciable controversy.

VIII

Accordingly, the court ORDERS that:

1. The defendants' motion for judgment notwithstanding the verdict is timely and may be considered by this court;

2. The plaintiff's motion for a new trial on the issue of damages is untimely and must be denied;

3. The plaintiff's motion for attorney's and paralegal's fees is. imely and said motion is hereby granted. The plaintiff is awarded attorney's and paralegal's fees in the amount of $45,383.17;

4. The plaintiff's bill of costs is denied; and

5. The plaintiff's motion to compel the defendants to pay for their own transcript on appeal is denied.

IT IS SO ORDERED.

DATED: December 6, 1985

LAWRENCE K. KARLTON
U.S. District Judge

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SACRAMENTO)

GINA MORANDI, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814. On December 11, 1985 (Date) I served the attached

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS/SUPPLEMENTAL APPENDIX C AND D

in said cause, by placing 3 true copy(ies) thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

JACK JACOBSON, ESQ.
1211 Pacific Ave.
Santa Cruz, CA 95060

Gina Morandi
AFFIANT

Subscribed and sworn to before me this 11th day of December, 19 85.

DEBORAH ARMSTRONG
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My commission expires Aug. 7, 1989

Deborah Armstrong
Notary Public in and for said County and State

ASM

(8/84)